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**BLACKSTONE MEDICAL, INC.** .  
. No. 08cv30145-map  
v. .  
. .  
**OSIRIS THERAPEUTICS, INC.** .  
. .  
v. .  
. .  
**NuVASIVE** .

**BEFORE THE HONORABLE MICHAEL A. PONSOR,  
UNITED STATES DISTRICT JUDGE,  
MOTION HEARING  
JULY 24, 2008.**

**APPEARANCES:**

**See page 2.**

**1 APPEARANCES:**

**2 For the plaintiff by telephone: Brian Hurst, 2001 Ross**  
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**4 J. Brent Alldredge and W. Barton Rankin,**  
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**6 For the plaintiff in person: John Pucci and J. Lizette**  
**7 Richards, 64 Gothic Street, Suite 4,**  
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**8**  
**9**  
**10 For the defendant Osiris by telephone: James Dillon, 155**  
**Seaport Boulevard, Boston, MA 02210-2600.**

**11 Tami Lyn Azorsky, 1900 K. Street, N.W.,**  
**12 Suite 100, Washington, D.C. 2006-1108.**

**13 For the defendant NuVasive by telephone: Bruce Falby and**  
**14 Jason Hannon, 33 Arch Street, 26th Floor,**  
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**15**

**16**

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**20**

**21**

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**25**

1 (Court commenced at 2:13.)

2

3 THE COURT: Good afternoon. Please be seated.

4 THE CLERK: This is the case of Blackstone

5 Medical versus Osiris Therapeutics, Civil Action

6 08-30145.

7 THE COURT: All right. What I'm going to do  
8 first is have counsel introduce themselves. I am  
9 speaking a little louder than I normally do because I'm  
10 hoping that our friends who are listening in by telephone  
11 will be able to hear what I'm saying, and I'm going to  
12 ask the people who are here by telephone to speak up a  
13 bit as well because it may be hard for us to hear you in  
14 the courtroom.

15 Here in the courtroom with me I have -- well, I'll  
16 let counsel introduce themselves here and tell me who  
17 they're representing.

18 MR. PUCCI: John Pucci, Your Honor, for  
19 Blackstone Medical.

20 THE COURT: Okay.

21 MS. RICHARDS: Lizette Richards also for  
22 Blackstone Medical.

23 THE COURT: And how do you spell your last  
24 name?

25 MS. RICHARDS: It's R-I-C-H-A-R-D-S.

1 THE COURT: All right. Were you able to hear  
2 that, those of you who are on the phone?

3 MR. DILLON: No, Your Honor, we were not. This  
4 is James Dillon from Foley Hoag and I could not hear. I  
5 could hear you fine.

6 THE COURT: Right. One of the problems that I  
7 will tell you all this with my system here is it is hard  
8 for people on the other end of the line to hear people in  
9 the courtroom. So I'm going to ask Mr. Pucci to come up  
10 a little closer to the telephone and we'll see if we  
11 can't manage this a little better with him closer.

12 I understand that I have on the line right now Mr.  
13 Dillon from Foley, Hoag, is that correct?

14 MR. DILLON: That is correct, here for the  
15 defendant Osiris Therapeutics.

16 THE COURT: Okay.

17 MR. DILLON: And with me on the phone is Tami  
18 Azorsky from McKenna Ling & Aldridge in Washington, D.C.  
19 There is a motion pro hac vice filed to enter her  
20 appearance in this case to which I have said there's no  
21 objection.

22 THE COURT: All right. Ms. Azorsky, can you  
23 spell your last name please?

24 MS. AZORSKY: Yes, it's A-Z-O-R-S-K-Y.

25 THE COURT: All right. Thank you.

1 I also understand that we have Mr. Hurst with us, is  
2 that right?

3 MR. HURST: That's correct, Your Honor, as well  
4 my co-counsel here at Baker & McKenzie, Brent Alldredge,  
5 A-L-L-D-R-E-D-G-E, and Bart Rankin, R-A-N-K-I-N.

6 THE COURT: Okay. And I also understand we  
7 have Bruce Falby joining us?

8 MR. FALBY: Yes, Your Honor, Bruce Falby; F, as  
9 in Frank, A-L-B as in boy, Y, DLA Piper in Boston. I  
10 represent NuVasive, Inc., the purchaser under the  
11 transaction that you've been asked to enjoin, and with me  
12 is Jason Hannon, H-A-N-N-O-N. He's not with me  
13 physically but also on the phone with us. He's the  
14 general counsel of NuVasive and we had planned to attend  
15 any live hearing or attending.

16 I had prepared a motion to intervene which I was  
17 going to hand up if there was a live hearing. I could  
18 file it electronically if you need me to in order to  
19 allow me to speak, but we obviously have an interest in  
20 what happens today.

21 THE COURT: All right. Thank you. Yes, you  
22 can file that motion electronically.

23 MR. FALBY: Thank you, Your Honor.

24 THE COURT: Let me say two things or address  
25 two subjects and then hear what counsel have to say. The

1 two subjects are first how very unhappy I am this  
2 afternoon to have to be addressing this issue in this  
3 way. I'm going to expand on that in a moment, and  
4 second, what I understand to be the background issues in  
5 this case.

6 You won't be surprised to learn if you look at your  
7 own professional life that I don't usually sit around at  
8 my desk saying, oh, boy, I wish someone would file a  
9 motion for temporary restraining order so I would have  
10 something to do.

11 My entire day has been disrupted by this motion and  
12 I'm not happy about it. I just received from the  
13 defendants a phone-book sized submission about 15 minutes  
14 before I came in here. I've been able to read the  
15 memorandum.

16 This problem has been brewing, as far as I can see,  
17 since May and I am suddenly having to stop everything,  
18 including a lot of fairly important matters, and attempt  
19 to digest this stuff on the fly.

20 I also don't particularly like hearing people by  
21 telephone. For one thing, our mechanism is not very good  
22 and I'm having to speak about 150 percent louder than I  
23 normally speak. I can't gauge body language, facial  
24 expression or get any sense of what the relationship is  
25 amongst the parties because you're in various places in

1 the country.

2 So at this point I'm in a plague on both your houses  
3 mood and pretty much inclined to put this all over until  
4 Monday and make everybody fly here and appear before me  
5 in person if this is so darn gone important that I have  
6 to stop what I'm doing and rule on it.

7 So I've now vented and hopefully I'll be able to  
8 relax and listen to what your arguments are, but as far  
9 as I'm concerned this is a heck of a way to run a  
10 railroad.

11 Of course, I know I will be hearing from each party  
12 in complete agreement with me and then saying, yes, but  
13 it's the other guy's fault that things are such a mess.  
14 That's not going to help me and I'm not particularly  
15 interested in that either. Here we are.

16 Now as I understand it, this is the background of  
17 the case, and I'm moving on to Roman Numeral II, the  
18 plaintiff is a distributor of a product which I'm going  
19 to call Trinity which belongs to the defendant Osiris.

20 Osiris is in the process of selling this particular  
21 asset to a third party named NuVasive. Blackstone has  
22 filed a motion for preliminary injunction in an attempt  
23 to block the sale.

24 The sale is scheduled to take place today or  
25 tomorrow and the plaintiff takes the position that

1       they're entitled to an immediate injunction from me  
2       barring the sale.

3       I have had an opportunity to read the submissions  
4       from the plaintiff and I've had an opportunity to read  
5       the submission from the defendant, which just hit my desk  
6       a few minutes ago. And when I say read the submission  
7       from the defendant, I mean the defendant's ten-page  
8       memorandum. There are a good deal of attachments which I  
9       have not had a chance to look at.

10       I guess I would like to begin by hearing from either  
11       Mr. Pucci or Mr. Hurst as to why we're here, and the  
12       reason that I ask that and you won't be surprised I  
13       suppose to hear me ask that because the point is made in  
14       the most recent submission from the defendant, paragraph  
15       11.2 of the operative agreement seems to contemplate  
16       exactly what's happening here.

17       The provision says that "Osiris may transfer this  
18       agreement without prior written consent of distributor to  
19       an affiliate or in connection with a merger or sale of  
20       all, or substantially all, of the stock or assets of  
21       Osiris relating to this agreement."

22       Now defendant takes the position, in short, that  
23       what they propose to do is to transfer without prior  
24       written consent of the distributor all of the assets  
25       relating to this agreement, exactly what is contemplated



1 as permitted by the distributorship agreement, and I  
2 don't understand why I'm here to try to prevent the  
3 defendant from doing what the distributor agreement seems  
4 to say that they can do.

5 I also have representations from the defendant that  
6 it does not intend to do anything to interfere with  
7 Blackstone's rights under the agreement at least not  
8 prior to December 31, 2008, and I have a representation  
9 from NuVasive that it intends to respect all of  
10 plaintiff's rights as distributor through December 31st  
11 of 2008.

12 I also have a representation that Osiris does not  
13 have and, to the extent that it might have, has not  
14 disclosed any confidential information relating to  
15 Blackstone.

16 So I guess I'm wondering what the problem is and why  
17 I'm being asked to step in in a situation where at least  
18 my cursory reading of the agreement between the parties  
19 suggests in Article 11, Section 11.2 that this is exactly  
20 the type of transaction that their agreement recognizes  
21 and permits.

22 So, Mr. Hurst, could you address at least that  
23 subject first or Mr. Pucci, whichever one of you would  
24 like to speak. Just for the record, Mr. Pucci has just  
25 gestured toward the telephone, Mr. Hurst, so I think

1     **you've got the laboring oar here. Perhaps you can**  
2     **enlighten me on that, and then you can add whatever I may**  
3     **be overlooking that you'd like to bring to my attention.**

4             **MR. HURST: I'll be glad to do so, Your Honor.**  
5     **Before addressing Section 11.2, let me just say that**  
6     **while I've not had a chance to read the defendant's**  
7     **pleadings, none of the representations that Your Honor**  
8     **recited have been made to Blackstone over the last two**  
9     **months during which our chief executive officer has been**  
10    **in frequent communication with Mr. Mills of Osiris, Mr.**  
11    **Hannon of NuVasive, Mr. Lukianov, the CEO of NuVasive, in**  
12    **an attempt to understand how Osiris could possibly sell**  
13    **this business to a competitor of ours and honor the**  
14    **various covenants in our distribution agreement.**

15            **So there has very much been an effort on our part to**  
16    **gain this understanding. The only thing we've been told**  
17    **clearly by Osiris is we are going to close as soon as**  
18    **possible after our July 24th shareholder meeting,**  
19    **notwithstanding the fact that our agreement with NuVasive**  
20    **doesn't require us to close until September 8th. That**  
21    **is why we are here and unfortunately ruining your day,**  
22    **which I apologize.**

23            **As to Section 11.2 you are correct. I understand**  
24    **that facially that section does permit Osiris to assign**  
25    **its distribution agreement in connection with the sale of**

1 the Osteocel business. That, however, is only one  
2 provision of the agreement.

3 Section 2.1 of the agreement under the heading  
4 appointment of distributor, second sentence from the  
5 bottom, says that "Osiris shall not enter into any  
6 agreement with any rights to a third party that would  
7 conflict with or violate the terms of this agreement."

8 THE COURT: Right. I did read that.

9 MR. HURST: The proposed sale to NuVasive, Your  
10 Honor, conflicts with this agreement in two ways  
11 certainly and in a third way possibly. The two certain  
12 ways it conflicts with this agreement is it destroys our  
13 right to exclusivity not only through the remainder of  
14 2008 but into renewal terms.

15 Number two, Osiris has already told us in writing --  
16 this is in the July 7th letter which is attached to the  
17 declaration of Michael Finegan -- that they will not  
18 honor our right to renew beyond December 31, 2008.

19 The third way that this sale to NuVasive breaches  
20 the agreement is the risk of the disclosure of  
21 confidential information.

22 Now I won't sit here and tell the court, nor have we  
23 represented to the court, that we know for a fact  
24 confidential information has been disclosed. The  
25 assurance that was made to the court has never been made

1 to us and we believe that at a minimum additional time is  
2 required to allow us to explore that.

3 THE COURT: Let me just take those three points  
4 one by one.

5 You say, first of all, that this sale would destroy  
6 your rights to exclusivity not only through the end of  
7 December 31, 2008 but during any renewal period. Let's  
8 just focus now on through December 31, 2008.

9 If you had a representation from NuVasive that you  
10 would remain -- all of your rights, to the extent that  
11 they exist as an exclusive distributor, would be  
12 respected through December 31, 2008, and that's the  
13 representation that's been made to me by the defendants,  
14 then that would not be any difficulty for your client.

15 I'm going to hear from counsel for defendant here in  
16 a moment, but at least, unless I've misread their  
17 memorandum as I've gone through it hastily here, their  
18 position is we know you have this distributorship  
19 agreement. We are giving it to NuVasive and both  
20 NuVasive and Osiris have said it's yours. We're going to  
21 comply with it 100 percent. There's not going to be any  
22 change through December 2008.

23 So I've kind of got a swearing match right now, but  
24 I hear that you haven't heard those representations you  
25 say, but from where I'm sitting, you know, I suppose the

1 simplest thing for me to do is to say that I'm going to  
2 deny the motion for preliminary relief on condition that  
3 both the defendant Osiris and NuVasive upon pain of  
4 sanctions fully respect the distributorship agreement  
5 through December 31, 2008.

6 Would an order along those lines -- well, tuck into  
7 the back of your head the question whether an order along  
8 those lines would solve your problem.

9 The second issue having to do with the right to  
10 renew, there you do have a dog fight. I think it's  
11 perfectly clear that NuVasive intends to terminate your  
12 agreement after December 31, 2008. I think they feel  
13 that they have a right to do it.

14 They say that -- I don't know if you've had a chance  
15 to read this memo yet, but they say that the performance  
16 objectives which were supposed to be set forth in Exhibit  
17 D which would have provided the basis for renewal were  
18 never in fact created.

19 There is no Exhibit D, and all that the agreement in  
20 its present form contains is an agreement to possibly  
21 agree on a renewal and that's not binding and they don't  
22 intend to -- they don't intend to renew you. I think  
23 that's a pretty clear inference from the current  
24 situation.

25 What do you say about that? Are you entitled to be

1 renewed and is some order from me today going to protect  
2 that right to renewal? Those are my two questions right  
3 now.

4 MR. HURST: Your Honor, I think the most  
5 important thing that an order from you today can do is  
6 protect an arbitrator's right to decide if we have a  
7 right to renew with Osiris. We did not contract with  
8 NuVasive. We contracted with Osiris, the manufacturer of  
9 this product.

10 The right to arbitration that we contracted for will  
11 not be effective or a meaningful right if the toothpaste  
12 gets out of the tube and this deal goes forward and  
13 closes.

14 Your Honor, of course, you put your finger on the  
15 reason why the type of order you described a moment ago,  
16 while helpful, does not get us all the way there because  
17 there's five or six months left in 2008 and yet we have a  
18 right to renew this agreement and continue to be the  
19 exclusive distributor for years beyond that.

20 Your Honor is correct, I mean with our competitor  
21 sitting in the driver's seat, the landscape has simply  
22 changed and there is -- we just don't believe that an  
23 arbitrator will be able to fashion effective relief with  
24 NuVasive in the shoes of Osiris.

25 We think Osiris has entered into this agreement and

1 while it may pain them to postpone their closing with  
2 NuVasive, it is their obligation to honor the agreement  
3 and honor the dispute resolution proceedings.

4 THE COURT: What is the significance in your  
5 view of paragraph 11.2 then? Under your argument  
6 wouldn't subparagraph A of paragraph 11.2 lose all its  
7 meaning?

8 It says, again I hate to repeat it but I hope I'm  
9 reading it correctly, it says "Osiris may transfer this  
10 agreement without prior written consent of distributor to  
11 an affiliate or in connection with a merger or a sale of  
12 all, or substantially all, of the stock or assets of  
13 Osiris relating to this agreement."

14 Now the defendant says that is precisely what's  
15 happening. This is a sale of all or substantially all of  
16 the assets of Osiris relating to this agreement pure and  
17 simple.

18 We know at least, unless things move faster than  
19 typically, if I enter a preliminary order and I say go to  
20 arbitration, we can kiss this goodbye for at least a year  
21 or six months while you go through arbitration and pick  
22 an arbitrator. I imagine there may be a possibility of  
23 some kind of judicial review by the unhappy party of the  
24 arbitration.

25 Unless it's a very speedy arbitration, this whole

1        thing slides into the icebox for quite awhile and I think  
2        that's something that I have to consider in weighing the  
3        balance of harms here. But tell me what does that mean  
4        if it doesn't cover this situation? What does 11.2  
5        Subsection A mean if it doesn't cover this situation?

6                MR. HURST: What it means, Your Honor, is  
7        there's a whole universe of other biologic companies out  
8        there that are not out there selling spinal surgery  
9        products to surgeons in hospitals the way that Blackstone  
10       and NuVasive are in head-to-head competition.

11       There are a whole universe of assignees to whom  
12       Osiris could have assigned this agreement without any  
13       objection on our part.

14       While 11.2 says what it says, 2.1 also says what it  
15       says and there's clearly tension between them and we are  
16       right at the point of that tension, and an assignment to  
17       NuVasive simply cannot take place without breaching the  
18       distribution agreement.

19       Osiris agreed it would not enter into any agreement  
20       or grant any rights to a third party re: NuVasive that  
21       would conflict with or violate the terms of the  
22       distribution agreement.

23                THE COURT: Okay.

24                MR. HURST: You've got to read it. You've got  
25       to -- I'm not saying you have to do anything.



1           **THE COURT:** No, no, I know what you mean. The  
2 two have to be read together.

3           Let me hear from whoever would like to speak up now  
4 on behalf of the defendant here, whether it's Mr. Dillon  
5 or Ms. Azorsky or whichever one of you would like to jump  
6 in here.

7           **MS. AZORSKY:** This is Ms. Azorsky. Thank you,  
8 Your Honor.

9           I think that when you addressed this at the  
10 beginning you are exactly right, and I think if any order  
11 should enter, it should be exactly the order that you  
12 described.

13          There 11.2(a) allows a transfer of this agreement  
14 without even disclosure or without even prior written  
15 consent of the distributor and that it is exactly what's  
16 happening here.

17          It is being transferred and the reason that  
18 Paragraph 2.1 doesn't conflict with that is because even  
19 with that transfer, Blackstone will continue to get  
20 everything it's entitled to get under this agreement.

21          I know you haven't had an opportunity to look at the  
22 declarations yet but we've summarized them in the  
23 memorandum and Osiris has stated that it intends to honor  
24 this agreement. NuVasive has stated that it intends to  
25 honor this agreement.

1           We have explained in Mr. Barns' declaration that the  
2           whole double counting concept that was put out there  
3           wouldn't be possible to honor the agreement if we  
4           transferred the business to NuVasive simply isn't true.

5           NuVasive is committed to continuing to give  
6           Blackstone 80 percent of its product and the exclusivity  
7           to which it's entitled through 2008.

8           There is a dispute about whether this agreement can  
9           be renewed at Blackstone's unilateral choice. We believe  
10          that they don't have a substantial likelihood of success  
11          on that argument.

12          Their argument is that this would continue for as  
13          long as they wanted it to continue and we would be their  
14          hostage until they decided they wanted out of this or  
15          developed some other product, and that's not what the  
16          agreement says. There are distinctive words. There is  
17          the use of the word shall and the use of the word may.

18          The only real dispute here is the extension. There  
19          is time to resolve that issue before the end of the year.  
20          There has been no breach of the agreement. There is no  
21          anticipatory breach because everybody who's out there has  
22          said we have no intention to breach. We intend to honor  
23          this agreement.

24                THE COURT: So if I might summarize what you're  
25          saying, the transaction that is here on the wings is one

1 in which NuVasive will simply step into your client's  
2 shoes and take over the obligations in the agreement and  
3 has every intention of fully complying with that  
4 agreement?

5 MS. AZORSKY: That is correct, Your Honor, and  
6 if there is any dispute in the future, then NuVasive will  
7 have to honor whatever the entity that resolves that  
8 dispute says they have to do. There's just nothing in  
9 this agreement that says the distributor can stop Osiris  
10 from selling a whole business line.

11 THE COURT: Let me hear from Mr. Falby or Mr.  
12 Hannon with regard to NuVasive. I have the same question  
13 with regard to NuVasive's intentions if they do -- if  
14 this transaction goes forward. Mr. Falby.

15 MR. FALBY: Yes, Your Honor. You've summarized  
16 it correctly that NuVasive will honor every obligation  
17 under the agreement.

18 My understanding of the primary complaint that  
19 Blackstone has is a complaint that my client intends  
20 itself to begin selling the product and distributing  
21 itself and competing as a distributor and destroying the  
22 exclusivity that belongs to Blackstone. That is not the  
23 case.

24 NuVasive is not -- NuVasive is not going to be  
25 distributing the product itself through the end of 2008.

1       **As Mr. Hannon said in his affidavit today that's been**  
2       **filed with Your Honor, NuVasive will perform under the**  
3       **agreement all of its obligations assuming performance by**  
4       **Blackstone of its obligation.**

5               **It will perform entirely in accordance with the**  
6       **agreement including the exclusivity provision through the**  
7       **end of 2008 and this is not new news. This was announced**  
8       **in a press release that Mr. Hannon attaches to his**  
9       **affidavit that was issued in May when the transaction was**  
10       **announced.**

11               **So the answer to your question is, yes, we will**  
12       **comply and we agree wholeheartedly with Osiris that there**  
13       **has been no breach. There's no anticipatory breach, and**  
14       **there is no conflict between 11.2 and 2.1 because nothing**  
15       **that's happening here in any way affects or impinges or**  
16       **infringes any right that Blackstone has under this**  
17       **distribution agreement.**

18               **THE COURT: And I take it you would agree with**  
19       **Attorney Azorsky that there may be a disagreement that**  
20       **the parties have about what happens after December 31,**  
21       **2008 when there is some type of consideration of renewal**  
22       **that's bound to come up.**

23               **MR. FALBY: Yes, we absolutely agree that**  
24       **there's a distribute about that and as to that there's**  
25       **obviously no exigency whatever because there's time to**

1 decide that in arbitration where it belongs before the  
2 end of the year.

3 THE COURT: All right.

4 MR. FALBY: There's certainly no present  
5 dispute that needs resolution or that presents an issue  
6 or any emergency at this moment that could possibly  
7 support the issuance of injunctive relief.

8 THE COURT: All right. Mr. Hurst, you've heard  
9 the representations of Attorney Azorsky and Attorney  
10 Falby. Do you have anything that you'd like to add?

11 MR. HURST: Two things, Your Honor. Although  
12 we've asked the question many times, this is the first, I  
13 hope, binding representation that our distribution  
14 agreement was going to be assigned to NuVasive.

15 When that question was put to NuVasive or Osiris  
16 before, it was met, more or less, with a shrug of the  
17 shoulders. We don't know; we'll have to wait and see.

18 Now Your Honor has already identified the logical  
19 inconsistency of NuVasive taking an assignment of this  
20 agreement and renewing it beyond 2008. Clearly they are  
21 setting themselves up to buy something that does not have  
22 the value they've assigned to it in their agreement, but  
23 if that is their representation that they're willing to  
24 abide with the decision that the agreement may be renewed  
25 beyond 2008, then that's great.

1           **Now the other thing I would point out about that is**  
2           **our agreement to arbitrate is with Osiris. It is not**  
3           **until this distribution agreement is assigned to NuVasive**  
4           **that we have a right to arbitrate with them, and I would**  
5           **like to know if they are going to represent to the court**  
6           **that they will honor that arbitration agreement.**

7           **THE COURT: Well, I'm not going to put them in**  
8           **a position of where they have to respond to that. They**  
9           **can certainly respond if they want to but I don't need**  
10          **them to do that in order to put myself in a position**  
11          **where I can rule.**

12          **I do want to correct one thing because we may have**  
13          **heard the representations of Osiris and NuVasive**  
14          **differently. I think that the position of Osiris and**  
15          **NuVasive, perhaps I'm inferring something here, but I**  
16          **think it's a pretty clear inference that they take the**  
17          **position that they have the right to terminate the**  
18          **agreement as of December 31, 2008.**

19          **I think they think that the renewal provisions of**  
20          **the agreement are precatory or descriptive of something**  
21          **that the parties might voluntarily enter into, but I**  
22          **think they also take the position that the provisions do**  
23          **not bind them to renew.**

24          **I don't know who's right on that and I don't think I**  
25          **have to decide that right now. I don't know just how**

1 binding the renewal provisions of the agreement are, and  
2 I do not know whether your client will have a right to  
3 renew the agreement.

4 I think I can say that I'm probably not telling you  
5 anything when I think we can expect that both Osiris and  
6 NuVasive will take the position that they are not  
7 obligated to renew and they were not making any  
8 representation of any understanding that they had that  
9 they were obligated to renew.

10 It's a funny world. You never know what's going to  
11 happen and maybe everyone will get together and renewal  
12 will occur. We don't know, but I do know that there's  
13 nothing here before me right now that requires immediate  
14 action from the court.

15 So based upon the representations that I have just  
16 heard, I'm going to deny plaintiff's motion for temporary  
17 relief. It is on condition that if the sale goes  
18 forward, the purchaser will comply fully with the  
19 provisions of the applicable agreement through the end of  
20 December 2008, and I understand that that is fully the  
21 intention both of the seller Osiris here and of the third  
22 party NuVasive.

23 Based upon that I do not find that there is either  
24 any showing of likelihood of success on the merits or of  
25 irreparable harm. Of course, the First Circuit has made

1 it clear many times that the decision at this stage is  
2 merely an assessment of probabilities. That does not  
3 mean that as this case goes forward you won't be able to  
4 show that there was some actionable conduct and that  
5 you're entitled to damages.

6 All I'm finding is that there is no need for any  
7 immediate action by the court and for the reasons I just  
8 stated I'm going to decline to take any action and deny  
9 your motion.

10 So unless anyone has anything further to say, I'm  
11 prepared to recess right now. Okay.

12 MR. FALBY: Your Honor, this is Bruce Falby  
13 and I just want to make one point clear. I said it  
14 before that we intend fully to comply. Obviously if  
15 Blackstone begins not to comply by not taking the product  
16 or by not paying for it, we will act appropriately in the  
17 exercise of what rights that gives us under the agreement  
18 or what rights we have at law, but assuming full  
19 performance by them, we intend to fully perform and  
20 that's what Mr. Hannon's declaration says.

21 THE COURT: Right. Well, I don't think that  
22 the plaintiffs are suggesting that anything about this  
23 proceeding would give them a license to ignore any  
24 provisions of the agreement. I don't hear any  
25 suggestions that they have any such intention.



1           The agreement is what the agreement is and it will  
2           continue. Based upon what I've heard I understand that  
3           it will continue through at least December of 2008 and  
4           the plaintiff will suffer no immediate prejudice as a  
5           result of that, and all the parties will have a full  
6           opportunity to litigate the question of the extension as  
7           needed.

8           We don't even know yet whether there will be a  
9           renewal. I think it's the position of NuVasive that  
10          there probably won't be but that decision still lies in  
11          the future. If there's nothing further then --

12                 MR. PUCCI: Nothing.

13                 THE COURT: -- the court will be in recess.  
14          Thank you all very much. Sorry for my grouchy comments  
15          at the beginning of the hearing. I appreciate your  
16          representations and that's where we will go. Thank you  
17          very much. Court's in recess.

18  
19                         (Court recessed at 2:47.)

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**C E R T I F I C A T E**

**I, Alice Moran, Official Federal Court Reporter for  
the United States District Court for the District of  
Massachusetts, do hereby certify that the foregoing  
transcript is a true and accurate transcription of my  
stenotype notes taken in the aforementioned matter to the  
best of my skill and ability.**

**/s/ Alice Moran**

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